

June 21, 2013

Melissa Mikesell
Alliance for Justice and
Alliance for Justice Action Campaign
1611 Telegraph Ave., Ste 1006
Oakland, CA 94612

Re: Your Request for Advice
Our File No. A-13-070

Dear Ms. Mikesell:

This letter responds to your request for advice regarding the gift provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission (“the Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

If your organization pays and supervises a fellow to provide assistance to a state agency, is the payment a “gift to an agency,” excluded from the Act’s gift provisions, if reported under Regulation 18944?

CONCLUSION

The payment for a fellow to assist a state agency in official agency business does not confer a personal benefit on any agency official. Accordingly, the payment is not a “gift” under the Act and need not be reported under Regulation 18944.

FACTS

The Alliance for Justice and Alliance for Justice Action Campaign (the “Alliance”) has been approached by a foundation about hosting a fellow to provide work for a state agency. As anticipated, the Alliance would pay and supervise the fellow, but the fellow would be assisting a

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

state agency with a specific set of projects. Under the Act, you ask whether this arrangement with a state agency must be reported as a “gift to the agency” under Regulation 18944.

ANALYSIS

The term “gift” is defined in Section 82028(a) as:

“Any payment that confers a *personal benefit* on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status.”² (Emphasis added.)

In an effort to reduce improper influences on public officials³, the Act regulates the receipt of gifts by public officials in three ways:

First, so that the public is made aware of any potential influences from gifts, the Act imposes reporting obligations on certain public officials requiring that any gifts aggregating to \$50 or more from the same source received during the calendar year are disclosed on the officials’ statements of economic interest. Reporting requirements apply to all officials listed in Section 87200 (Section 87202), all candidates for an office specified in Section 87200 (Section 87201), and employees designated in an agency’s conflict-of-interest code (Section 87302(b)).

Secondly, the Act places limitations on the acceptance of gifts by certain public officials. The current limit is \$440 from a single source in a calendar year. (Section 89503; Regulation 18940.2.) This gift limit applies to all elected state and local officials or other individuals designated in Section 87200; all candidates for state, local, or judicial office; and any employee designated in his or her agency’s conflict-of-interest code, if the employee would be required to disclose the receipt of income or gifts from the source of the gift on his or her statement of economic interest. (Section 89503.)

Finally, the Act prohibits any public official from making, participating in making, or using his or her official position to influence the outcome of a governmental decision involving the donor of a gift or gifts with an aggregate value of \$440 or more provided to, received by, or promised to the official within the 12 months prior to the date the decision is made. (Sections 87100 and 87103(e); Regulations 18700 and 18703.4.)

For payments that are “gifts to an agency,” Regulation 18944 provides a narrow exception to the Act’s gift provisions for certain payments that are controlled by the agency and

² Section 82044 defines payment, in part, as any “rendering of ... services or anything else of value, whether tangible or intangible.”

³ A “public official” is “every member, officer, employee, or consultant of a state or local governmental agency.” (Section 82048.)

used for official agency business. Nonetheless, a payment is considered a “gift” only if there is a personal benefit to a public official. Thus, a payment to an agency that does not provide a personal benefit is outside the scope of the gift provisions and Regulation 18944.

Based upon the facts you have provided, the fellow would assist the state agency with official agency business. While the fellow will undoubtedly assist agency officials in performing official agency duties, agency officials do not receive a personal benefit from assistance limited solely to official agency business. (See *Montgomery* Advice Letter, No. A-11-099.) Therefore, the payment is not a gift under the Act and need not be reported under Regulation 18944.

Notwithstanding our conclusion that the payment for a fellow is not a gift, a payment by the organization to the fellow would be classified as income to the fellow from the organization. (See Section 82030(a).) To the extent that the fellow makes or participates in making governmental decisions, the position must be designated in the agency’s conflict-of-interest code.⁴ Additionally, this income must be reported by the fellow as a governmental employee or consultant and potentially disqualifies the fellow from making, participating in making, or influencing any agency decision that may foreseeably have a material effect on the organization as a source of income. (See Sections 87100, 87103, 87300 and 87306; Regulations 18700(a).)⁵

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl

⁴ Pursuant to Regulation 18734, consultants and newly created positions that make or participate in governmental decisions that may foreseeably have a material effect on any financial interest shall file under the broadest disclosure category in the agency’s conflict-of-interest code until the agency amends its code to reflect the position or sets interim disclosure provisions more tailored to the position.

⁵ We caution that we have previously advised that payments made at the request of an elected official, to specifically provide an assistant for the official, were at the official’s behest and potentially reportable. (*Steele* Advice Letter, No. A-06-091.) However, to the extent that the fellow will perform general agency duties, it does not appear that the payments are behested by an elected official.